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For Petitioners SURFRIDER FOUNDATION

**Before the State Water Resources Control Board**

In the Matter of Adoption of  
 Order No. R9-2008-0039,  
 NPDES No. CA0109223,  
 by the San Diego Regional Water  
 Quality Control Board for the  
 Carlsbad Desalination Project

**PETITION REQUESTING STATE WATER  
 BOARD REVIEW OF REGIONAL WATER  
 BOARD ORDER NO. R9-2008-0039**

Pursuant to Section 13320 of the California Water Code and Section 2050 of Title 23 of the California Code of Regulations ("CCR"), Surfrider Foundation ("Surfrider") hereby petitions the State Water Resources Control Board ("State Board") to review the April 9, 2008 adoption by the California Regional Water Quality Control Board for the San Diego Region ("Regional Board") of Order No. R9-2008-0039, NPDES No. CA0109223, conditionally approving a "Revised Flow, Entrainment and Impingement Minimization Plan" (the "Minimization Plan") under the Porter-Cologne Water Quality Control Act ("Porter-Cologne Act"), Cal. Water Code, div. 7, ch. 5.5.

This appeal concerns the Regional Board's failure to (i) enforce California Water Code Section 13142.5(b) in determining whether the Carlsbad Desalination Project utilizes the "best available site, design, technology, and mitigation measures feasible [to] minimize the intake and mortality of all forms of marine life" and (ii) exercise its "best professional judgment" in determining whether the additional intake of seawater through the co-located Encina Power Station facility satisfies the "best technology available for minimizing adverse environmental impact," as required by section 316(b) of the Clean Water Act, 33 U.S.C. § 1326(b). For the reasons described below, Petitioner Surfrider requests that the State Board vacate the Regional Board's April 9, 2008 approval and remand Order No. R9-2008-0039 to the San Diego Regional Board for further consideration.

1. NAME, ADDRESS, TELEPHONE AND E-MAIL ADDRESS OF THE PETITIONER:

Surfrider Foundation  
8117 West Manchester Ave., # 297  
Playa del Rey, California 90293  
Telephone: (310) 410-2890  
E-mail: [jgeever@surfrider.org](mailto:jgeever@surfrider.org)  
Attention: Joe Geever

2. THE SPECIFIC ACTION OR INACTION OF THE REGIONAL BOARD WHICH THE STATE BOARD IS REQUESTED TO REVIEW AND A COPY OF ANY ORDER OR RESOLUTION OF THE REGIONAL BOARD WHICH IS REFERRED TO IN THE PETITION:

Surfrider seeks review, reversal, and remand of San Diego Regional Board Order No. R9-2008-0039, which conditionally approved a "Revised Flow, Entrainment and Impingement Minimization Plan" for the Carlsbad Desalination Project. A copy of the Order is attached hereto. In particular, Petitioner challenges the Regional Board's failure to comply with Cal. Water Code § 13142.5(b) and/or 33 U.S.C. § 1326(b) in adopting the Order.

3. THE DATE ON WHICH THE REGIONAL BOARD ACTED OR REFUSED TO ACT OR ON WHICH THE REGIONAL BOARD WAS REQUESTED TO ACT:

April 9, 2008.

4. A FULL AND COMPLETE STATEMENT OF REASONS THE ACTION OR FAILURE TO ACT WAS INAPPROPRIATE OR IMPROPER:

The Regional Board's April 9, 2008 "conditional approval" of the Minimization Plan is conceptually, procedurally, and substantively flawed. To understand why this is so, it is important to review the history of this matter. On August 11, 2006, the Regional Board adopted Order R9-2006-0065, issuing NPDES Permit No. CA0109223, for the discharge of up to 57 million gallons per day of wastewater from the proposed Carlsbad Desalination Project ("CDP"). When Order R9-2006-0065 was adopted, the Regional Board anticipated that, for the near-term, much of the intake water for the CDP facility will be drawn from the cooling water discharged by the co-located Encina Power Station ("EPS"). The EPS is subject to its own NPDES discharge permit, as well as the "best technology available" requirements of Clean Water Act section 316(b). See Order No. R9-2006-0043. Recognizing that at least on some occasions the CDP facility's intake requirements will exceed the volume of water discharged by the EPS, which operates a significantly reduced capacity, the Regional Board's August 11, 2006 Order required permittee Poseidon Resources Corporation to submit a plan assessing procedures, practices, and mitigation measures to minimize impacts on marine organisms from the intake of seawater in excess of the amount required to operate the EPS. This requirement was imposed pursuant to the

Porter-Cologne Act, which provides that the Regional Board shall ensure that the best site, design, technology, and mitigation measures feasible be employed to minimize the intake and mortality of all forms of marine life at facilities using seawater for industrial purposes. Cal. Water Code § 13142.5.

On March 7, 2008, Poseidon submitted the Minimization Plan at issue in this Petition. As the Regional Board itself acknowledged, that Minimization Plan does not include a specific mitigation alternative that will compensate for entrainment and impingement impacts to the beneficial uses of Agua Hedionda Lagoon from CDP's operations. Order at 2. Nevertheless, the Regional Board "conditionally" approved the Minimization Plan and simultaneously stated that additional evaluation of appropriate mitigation and/or minimization of impacts to marine organisms from CDP's operations will be necessary once Poseidon proposes to operate the CDP independent of the EPS. Order at 3. This latter requirement is necessary to address the expected phase-out of once-through cooling as a result of EPS's proposed repowering with an alternative, environmentally protective cooling system that does not require the withdrawal of seawater from the lagoon. Thus, the Regional Board's approval of the Minimization Plan is both conditional on further evaluation by Poseidon and of limited duration, valid only until the EPS no longer withdraws seawater to operate its cooling system. This limited conditional approval raises several troubling legal and policy concerns.

As a threshold matter, it is unclear what, if any, operations were actually approved by the April 9, 2008 Order. To the extent that the Regional Board approved current seawater withdrawals in excess of the wastewater stream provided by the EPS facility in connection with its power generating activities, it did so without ensuring use of the best feasible site, design, technology, and mitigation measures, in violation of California Water Code section 13142.5 – and indeed, without any opportunity for the public to evaluate or critique the facility's compliance with the Porter-Cologne Act. In comments on the proposed Order, Petitioner raised its strong concern that there was insufficient time for the public to review and assess the Minimization Plan and, in fact, the Regional Board itself found the Plan to be inadequate. Thus, the April 9, 2008 Order cannot, as a matter of law, confer any right to proceed with the project because the Regional Board has not yet satisfied the statutory requirements of section 13142.5. At a minimum, therefore, the State Board should clarify that the April 9, 2008 Order does not confer any rights on Poseidon to operate at water consumption levels above those necessary for power generation at the EPS facility.

If the Regional Board's April 9, 2008 action is read to convey actual approval of the CDP's desalination operations at a level that allows Poseidon to withdraw more water than the EPS facility requires and discharges, the resulting Order fails to comply with the letter or the spirit of the Porter-Cologne Act. The statute expressly provides that for each new industrial installation using seawater for processing, "the best available site, design, technology, and mitigation measures feasible shall be used to minimize the intake and mortality of all forms of marine life." Cal. Water Code § 13142.5(b) (emphasis added). There is nothing in the record for this matter demonstrating that the Regional Board reviewed and evaluated best sites, best

designs, best technologies, or best mitigation measures for the CDP. Before the CDP is allowed to use any seawater in excess of the amount that the EPS requires and discharges in connection with its power generation activities, the Regional Board must carefully assess each of these statutory factors as applied to the facts at the CDP facility and it must make reasoned findings about each of them.

Moreover, to the extent that the Order is deemed to allow excess withdrawal of seawater above and beyond the amount required to generate power under the EPS's existing NPDES permit, that power plant permit must be reopened and reevaluated under the "best professional judgment" standard for compliance with section 316(b) of the Clean Water Act, consistent with the U.S. EPA's recent direction on this issue and with sound public policy. Accordingly, if this Board interprets Order R9-2008-0039 to confer any new rights on Poseidon, it should order the Regional Board to reopen the NPDES for the EPS facility for further consideration and a new Clean Water Act section 316(b) compliance determination.

##### 5. THE MANNER IN WHICH THE PETITIONER IS AGGRIEVED:

Surfrider Foundation is a grassroots, nonprofit environmental organization dedicated to the protection and enjoyment of the world's and California's oceans, waves and beaches. Headquartered in San Clemente, California, Surfrider and its 50,000 members recognize that the biodiversity and ecological integrity of the planet's coasts are necessary and irreplaceable and, for that reason, are committed to preserving natural living and non-living diversity and ecological integrity of the coastal environment. In particular, Surfrider works to protect the coastal and marine environment for all people through conservation, activism, research, and education.

Surfrider members benefit directly from the protection of these natural resources by using them for a diversity of recreational and aesthetic enjoyment purposes. Additionally, the waters in question are an important resource for recreational and commercial fisheries. The waters also provide significant wildlife values important to the mission and purpose of Petitioners. The value of these waters includes, among other things, critical nesting and feeding grounds for resident and migratory water birds, essential habitat for endangered species and other plants and animals, nursery areas for fish and shellfish and their aquatic food organisms, and open space areas.

As explained above, Order No. R9-2008-0039 may be read by some to authorize the CDP facility to withdraw seawater above that required for EPS's generating operations, destroying all marine life entrained in that additional intake water. EPA and the State of California have recognized the significant adverse impacts to the coastal environmental from such once-through cooling systems. *See, e.g., California Energy Commission Staff Report, Issues and Environmental Impacts Associated with Once-Through Cooling at California's Coastal Power Plants* (June 2005). Accordingly, Surfrider members who use and enjoy these waters are directly and adversely aggrieved by the issuance of Regional Board Order No. R9-2008-0039.

6. THE SPECIFIC ACTION BY THE STATE OR REGIONAL BOARD WHICH PETITIONER REQUESTS:

For the reasons states in items 4 and 7, Surfrider seeks an order by the State Board vacating the Regional Board's April 9, 2008 action, remanding Order No. R9-2008-0039 to the Regional Board, and directing the Regional Board to reconsider this matter in light of the mandates of the Porter-Cologne Act to minimize the intake and mortality of marine life, as well as California's desire to phase-out destructive once-through cooling systems and the State Board's pending proposal to impose more environmentally protective requirements on such systems. Additionally, if this Board concludes that the Order authorizes additional withdrawals of seawater above the amount necessary for power generation at the EPS, it should direct the Regional Board to reopen and reconsider the NPDES for the EPS facility for compliance with Clean Water Act section 316(b).

7. A STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF LEGAL ISSUES RAISED IN THE PETITION:

A. The Regional Board's Failure to Reopen the NPDES Permit for the EPS Facility to Account for Incremental Impacts from Operation of the CDP Is Inconsistent with Section 316(b) of the Clean Water Act, Sound Public Policy, and EPA Direction on this Issue.

Section 316(b) of the Clean Water Act requires that cooling water intake systems reflect the "best technology available" for minimizing adverse environmental impacts. 33 U.S.C. § 1326(b). Similarly, the Porter-Cologne Act requires that "[f]or each new or expanded coastal powerplant or other industrial installation using seawater for cooling, heating, or industrial processing, the best available site, design, technology, and mitigation measures feasible shall be used to minimize the intake and mortality of all forms of marine life." Cal. Water Code § 13142.5(b). In 2004, EPA adopted regulations implementing section 316(b) for renewals of NPDES permits at existing power plants, commonly known as the "Phase II" rules. 69 Fed. Reg. 41,683 (July 9, 2004). Those regulations established a national performance standard for existing facilities that required flow reduction "commensurate with a closed-cycle recirculating system" or, in the alternative, a 60 to 95 percent reduction in the facility's entrainment and impingement mortality. 40 C.F.R. § 124.95(a)-(b).

In that rulemaking procedure, EPA's Response to Comments concluded that "[t]he Phase II regulations apply only to facilities that generate and transmit or sell power, and therefore do not apply to desalination facilities unless they share an intake with a power plant." As EPA explained, "[s]ome desalination plants share intakes with power plants. In such situations, the 316(b) regulations would apply to the intake flow attributed to a desalination plant if the intake flow exceeds whatever regulatory threshold is established in the Phase I, II, or III regulations, but the power plant would be the permitted entity." See Comment ID: 316bEFR.026.003 at 528 (available at <http://www.epa.gov/waterscience/316b/phase2/comments/author-ph2.pdf>). EPA's

approach implements sound public policy. Co-located desalination facilities with higher water intake demands than the existing power plant must be required to evaluate their additional environmental impacts and to satisfy the section 316(b) performance standards if the purpose and intent of the Clean Water Act is to be achieved.

Following promulgation of the "Phase II" regulations, the U.S. Court of Appeals for the Second Circuit invalidated a number of exemptions to the prescribed performance standards. *Riverkeeper v. U.S. EPA*, 475 F.3d 83 (2d Cir. 2007) ("Riverkeeper II"). Most important for this matter, *Riverkeeper II* prohibited the use of "after the fact restoration" to satisfy the mandate of employing "best technology available" for minimizing adverse impacts to the environment. Several state agencies also have endorsed more stringent safeguards on these facilities. Staff of the California Energy Commission has called for more analysis of cooling system impacts and for incentives and new policy that promote alternative cooling systems. California Energy Commission Staff Report, *Issues and Environmental Impacts Associated with Once-Through Cooling at California's Coastal Power Plants* (June 2005). Consistent with these recommendations, on April 17, 2006, the California State Lands Commission, which has continuing jurisdiction over the state's public trust tidelands and resources, adopted a resolution acknowledging the negative environmental impacts of once-through cooling systems and declaring state policy to prohibit future leases for facilities utilizing such systems. On May 5, 2008, the State Lands Commission reaffirmed its call to eliminate the use of once-through cooling technology in California. Similarly, on April 20, 2006, the California Ocean Protection Council adopted a resolution calling for a study regarding the technical feasibility of converting coastal power plants to alternative cooling technologies and urging the State Water Board to adopt protective controls to reduce marine life mortality at coastal power plants by 90 to 95 percent – essentially endorsing the national performance standard of closed-cycle cooling without the exceptions built into the Phase II regulations.

The State Board likewise has embarked on an effort to review and potentially tighten the state's requirements for coastal power plant cooling systems. The proposal on which this Board is presently seeking public comment would require reductions in flow and intake velocity, at a minimum, to those commensurate with that which can be attained by a closed cycle cooling system (Track I). Alternatively, in limited circumstances where Track I is not feasible, the proposed guidance would require power plant to reduce the level of adverse impacts from the cooling water intake structure to a level comparable with that which could be achieved under Track I using operational or structural controls or both (Track II). State Water Resources Control Board, *Scoping Document: Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling* (March, 2008). Moreover, the use of restoration in lieu of alternative technologies or operational and structural controls would only be appropriate as compensation for marine life mortality in the interim period between adoption of the guidelines and implementation of those guidelines at a given facility during the permit renewal process. *Id.*

While the federal Phase II rules were remanded to US EPA by the *Riverkeeper II* court, EPA has subsequently directed that permitting agencies must continue to exercise their "best

professional judgment" as to what constitutes best technology available for minimizing adverse environmental impacts. See Letter from US EPA Administrator Grumbles. Best professional judgment, if it means anything, must include a careful review of facility impacts in light of the regulatory judgments already made by EPA, including in the Response to Comments directly addressing co-located desalination facilities, and various California state agencies, as well as the legal interpretations articulated in *Riverkeeper II*. Thus, the Regional Board cannot simply ignore the adverse environmental impacts of the EPS's once-through cooling system. Rather, the Regional Board is required to consider the exacerbation of those impacts by the additional withdrawal of seawater to supply "source water" to CDP at times when the EPS is either not generating electricity or is operating at a level that requires less cooling water than the CDP demands.

The confused procedural history of this matter caused this important issue to be ignored at the Regional Board hearing on the Order. The Minimization Plan submitted by Poseidon was expressly drafted to address compliance with Section 13142.5(b) under the circumstances wherein the CDP would eventually operate as a "stand alone facility." Petitioner submitted comments specifically raising concerns about the Plan's interpretation of section 13142.5(b) and the failure of the document to fully analyze a project design, site, and alternative source water intake technologies that would minimize the intake and mortality of all forms of marine life. Petitioners submitted these comments in the belief that the Regional Board intended to adopt a final approval under section 13142.5(b). The Agenda for the April 9, 2008 hearing simply stated:

Poseidon Resources Corporation, Proposed Carlsbad Desalination Project – the Regional Board will consider approval of a Technical Report for Revised Flow, Entrainment and Impingement Minimization Plan (a Special Study), dated March 6, 2008, which was submitted as required by Order No. R9-2006-0065, NPDES No. CA0109223.

The staff subsequently submitted and uploaded to the Board's website a document entitled "Technical Report" which cited numerous reasons supporting the postponement of a decision by the Regional Board to adopt the Minimization Plan. It was unclear at the time of the hearing whether the Regional Board was considering the "Technical Report" for the Minimization Plan (as the Agenda item suggested) or the Minimization Plan itself.

Consequently, it was unclear before the hearing that the Regional Board was only considering interim measures for operation of the CDP. Had the public notice documents been more clear and provided adequate time for the public to respond, Petitioner would have had an opportunity to comment on the need to amend the NPDES permit for the EPS to meet the directives of EPA in the Response to Comments cited above. Because the public notice was inadequate, Petitioner was not alerted to all of the issues raised by what became the final Order and the Regional Board itself did not take public comment on the issue of reopening the NPDES permit for the EPS facility.

**B. The Regional Board's Failure to Consider Best Sites, Design, Technology, and Mitigation Measures to Minimize the Intake and Mortality of Marine Life Violates the Porter-Cologne Act.**

As discussed above, section 13142.5(b) of the California Water Code clearly articulates four different factors that must be meaningfully considered before the Regional can approve the CDP – best feasible site, design, technology and mitigation measures. The Regional Board has not yet considered or evaluated these factors, in connection with either operation of the CDP as a stand-alone facility once the EPS ceases its once-through cooling activities or incremental impacts caused by CDP water demands in excess of the wastewater supply generated by EPS in producing power. Moreover, like section 316(b) of the Clean Water Act, section 13142.5(b) of the California Water Code cannot be read to allow after-the-fact restoration activities as contemplated by Poseidon in its rejected Minimization Plan. Rather, industrial facilities using seawater “shall” use the best feasible site, design, technology and mitigation measures to “minimize intake and mortality.” Thus, like design and technology features, the mitigation measures must minimize before-the-fact intake and mortality, not after-the-fact restoration. Such before-the-fact site, design, technology, and mitigation measures have not even been addressed by the inadequate Poseidon documents, let alone meaningfully evaluated by the Regional Board. Accordingly, the State Board should clarify that Order No: R9-2008-0039 does not authorize any stand-alone operation by the CDP and is invalid to the extent that it purports to authorize incremental intake in excess of the wastewater discharge provided by the EPS facility in connected with the generation of power.

**8. A STATEMENT THAT THE PETITION HAS BEEN SENT TO THE APPROPRIATE REGIONAL BOARD AND TO THE DISCHARGER, IF NOT THE PETITIONER:**

A true and correct copy of this petition was mailed on May 8, 2008 to the Regional Board and the Discharger at the following addresses:

John Robertus, Executive Officer  
California Regional Water Quality Control Board  
San Diego Region  
9174 Sky Park Court, Suite 300  
San Diego, California 92123

Poseidon Resources Corporation  
501 West Broadway, Suite 840  
San Diego, California 92101

Cabrillo Power I LLC  
4600 Carlsbad Blvd.  
Carlsbad, California 92008-4301



9. A STATEMENT THAT THE SUBSTANTIVE ISSUES OR OBJECTIONS RAISED  
IN THE PETITION WERE RAISED BEFORE THE REGIONAL BOARD:

Petitioner Surfrider raised the issues discussed in this petition before the San Diego Regional Board in written comments dated April 2, 2008, a copy of which is attached hereto, and in oral comments during the April 9, 2008 hearing on this matter. To the extent that the issue of requiring an amendment to the EPS NPDES permit was not raised in these comments, Petitioner argue that this was the result of inadequate clarity in the public notice of the agenda and inadequate time to clarify the purpose of the hearing.

\* \* \*

If you have any questions regarding this petition, please feel free to contact us directly.

Dated: May 7, 2008

Respectfully submitted,

By: Deborah A. Sivas  
Deborah A. Sivas



Dan Skopec  
Acting Secretary

# California Regional Water Quality Control Board

## San Diego Region

Over 50 Years Serving San Diego, Orange, and Riverside Counties  
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Governor

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(858) 467-2952 • Fax (858) 571-6972  
<http://www.waterboards.ca.gov/sandiego>

April 17, 2008

**CERTIFIED – REGISTERED MAIL**

7007 3020 0001 0040 7096

Mr. Peter M. MacLaggan  
Senior Vice President  
Poseidon Resources Corporation  
501 W. Broadway, Suite 840  
San Diego, CA 92101

In reply refer to:  
**CRU: 02-1429.02:bkelly**

Dear Mr. MacLaggan:

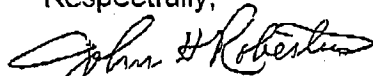
**ADOPTED ORDER NO. R9-2008-0039, AN ORDER CONDITIONALLY APPROVING  
REVISED FLOW, ENTRAINMENT, AND IMPINGEMENT MINIMIZATION PLAN,  
POSEIDON RESOURCES CORPORATION, CARLSBAD DESALINATION PROJECT**

Enclosed is Order No. R9-2008-0039, which was adopted by the Regional Board at their April 9, 2008 meeting and provides conditional approval of Poseidon's Flow, Entrainment, and Impingement Minimization Plan (Plan) dated March 6, 2008. Within six months of adoption of Order No. R9-2008-0039, Poseidon is required to submit an amendment to the Plan that includes a specific proposal for mitigation of the impacts, by impingement and entrainment upon marine organisms resulting from the intake of seawater from Agua Hedionda Lagoon.

The heading portion of this letter includes a Regional Board code number noted after "In reply refer to:" In order to assist us in the processing of your correspondence please include this code number in the heading or subject line portion of all correspondence and reports to the Regional Board pertaining to this matter.

If you have any questions regarding the above, please contact Mr. Brian Kelley at (858) 467-4254, or at [bkelly@waterboards.ca.gov](mailto:bkelly@waterboards.ca.gov).

Respectfully,

  
John H. Robertus  
Executive Officer

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April 17, 2008

Mr. Peter M. MacLaggan  
Poseidon Resources Corporation  
Adopted Resolution R9-2008-0039

cc:

State Water Resources Control Board  
Division of Water Quality  
P.O. Box 944213  
Sacramento, CA 94244-2130  
Attn: James Maughan

U.S. Environmental Protection Agency, Region IX  
75 Hawthorne Street  
San Francisco, CA 94105  
Attn: Douglas Eberhardt

Bill Paznokas  
California Department of Fish & Game  
4949 Viewridge Road  
San Diego, CA 92123

Mr. Tom Luster  
California Coastal Commission  
Energy and Ocean Resources Unit  
45 Fremont, Suite 2000  
San Francisco, CA 94105-2219

Judy Brown  
Public Land Management Specialist  
CA State Lands Commission  
100 Howe Ave., Suite 100-South  
Sacramento, CA 95825-8202

Sharon Taylor  
Division Chief  
United States Fish & Wildlife Services  
6010 Hidden Valley Road  
Carlsbad, CA 92011

cc: (See Enclosed Interested Parties List)



**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN DIEGO REGION**

**RESOLUTION NO. R9-2008-0039**

**CONDITIONAL APPROVAL OF  
REVISED FLOW, ENTRAINMENT, AND IMPINGEMENT MINIMIZATION PLAN  
FOR  
POSEIDON RESOURCES CORPORATION  
CARLSBAD DESALINATION PROJECT**

WHEREAS, the California Regional Water Quality Control Board, San Diego Region (hereinafter San Diego Water Board), finds that:

1. On August 11, 2006, the Regional Board adopted Order R9-2006-0065 NPDES No. CA0109223 (Order No. R9-2006-0065) establishing waste discharge requirements for Poseidon Resources Corporation (Poseidon) to discharge up to 57 million gallons per day (MGD) of a combined waste stream comprised of concentrated saline waste seawater and filter backwash wastewater from the Carlsbad Desalination Project (CDP) into the Pacific Ocean via the Encina Power Station's (EPS) cooling water discharge channel.
2. As proposed in Poseidon's Report of Waste Discharge for Order No. R9-2006-0065, the CDP will operate in conjunction with the EPS and will draw upon cooling water discharges by EPS for its intake requirements in the production of fresh potable water. As recognized in Section VI.C.2(e) of Order No. R9-2006-0065, CDP's intake requirements may, at times, exceed the volume of seawater being discharged by the EPS during times when EPS temporarily ceases operating to generate electricity. During these periods, EPS will operate its intake structures to produce intake water sufficient to meet CDP's intake needs.
3. The operations at the CDP are not subject to the statutory requirements of section 316(b) of the Clean Water Act as that section pertains only to impacts from intake of seawater for the purpose of power generation.
4. CDP is, however, a new industrial installation that is subject to California Water Code Section 13142.5 which requires use of best available site design, design, technology, and mitigation measures feasible to minimize the intake and mortality of all forms of marine life.
5. Section VI.C.2(e) of Order No. R9-2006-0065 requires Poseidon to submit (within 180 days of adoption), a Flow, Entrainment and Impingement Minimization Plan ("Plan") that "shall assess the feasibility of site-specific plans, procedures, and practices to be implemented and/or mitigation measures to minimize the impacts to marine organisms when the CDP intake requirements exceed the volume of water

Carlsbad Desalination Plant  
Mitigation Plan:  
Resolution No. R9-2008-0039

-2-

April 9, 2008

being discharged by the EPS." Thus, Poseidon is required to submit a plan to minimize these impacts to marine organisms under conditions of operation in conjunction with the Encina Power Station (EPS), as described in Finding II.B of Order No. R9-2006-0065. Approval of the Plan is currently not a condition for commencement of the discharge from the CDP.

6. On March 7, 2008, Poseidon submitted an updated Revised Flow, Entrainment, and Impingement Minimization Plan (Plan) to address best available site design, design, technology, and mitigation measures feasible to minimize the intake and mortality of all forms of marine life and Order No. R9-2006-0065 Section VI.C.2(e) requirements.
7. As submitted, the Plan does not include a specific mitigation alternative but instead sets forth a process to be used for evaluating and selecting a specific mitigation alternative that will compensate for impacts, to beneficial uses of Agua Hedionda Lagoon, from entrainment and impingement of marine organisms by operations at the CDP. An amendment to the Plan containing a specific mitigation alternative must be submitted to the Regional Board for approval.
8. The Plan, including any amendments subsequently approved by the Regional Board, is of limited duration and is applicable only to Poseidon's current cooperative operation with EPS. Upon Poseidon's proposal to operate CDP independent of EPS or when EPS permanently ceases power generation operations, it may be necessary to further evaluate appropriate mitigation and/or minimization of impacts to marine organisms of CDP's operations.
9. This action is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, Section 21000 et seq.) in accordance with Water Code section 13389 (see *County of Los Angeles v. California State Water Resources Control Board*, (2006) 143 Cal.App.4<sup>th</sup> 985, 50 Cal.Rptr. 3d 619), and this action of the Regional Board does not have the potential to cause a significant effect on the environment. (See Title 14, California Code of Regulations, section 15061.)

THEREFORE, BE IT RESOLVED THAT:

1. The Plan, dated March 6, 2008, does not include specific implementation provisions as required in Section VI.C.2.(e) of Order No. R9-2006-0065 and does not as yet resolve the concerns noted in the Regional Board's February 19, 2008 letter to Poseidon Resources.
2. The San Diego Water Board hereby conditionally approves the Plan.
3. Within six months of adoption of this resolution, Poseidon shall submit to the Regional Board Executive Officer, for approval by the Regional Board, an amendment to the Plan that includes a specific proposal for mitigation of the impacts, by impingement and entrainment upon marine organisms resulting from the

Carlsbad Desalination Plant  
Mitigation Plan:  
Resolution No. R9-2008-0039

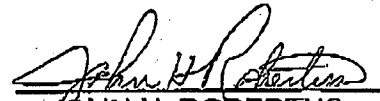
-3-

April 9, 2008

intake of seawater from Agua Hedionda Lagoon, as required by Section VI.C.2(e) of Order No. R9-2006-0065; and shall resolve the concerns identified in the Regional Board's February 19, 2008 letter to Poseidon Resources, and the following additional concerns:

- a) Identification of impacts from impingement and entrainment;
  - b) Adequate monitoring data to determine the impacts from impingement and entrainment;
  - c) Coordination among participating agencies for the amendment of the Plan as required by Section 13225 of the California Water Code;
  - d) Adequacy of mitigation; and
  - e) Commitment to fully implement the amendment to the Plan.
4. Poseidon's Plan, including any amendments that are subsequently approved by the Regional Board, are of limited duration and are applicable only to CDP's current cooperative operation with EPS. When Poseidon proposes to operate independent of EPS or EPS permanently ceases power generation operations, EPS's cessation of power generation operations, would be necessary to further evaluate appropriate mitigation and/or minimization of impacts to marine organisms of CDP's operations.

*I, John H. Robertus, Executive Officer, do hereby certify that the foregoing is a full, true and correct copy of a resolution adopted by the California Regional Water Quality Control Board, San Diego Region, on April 9, 2008.*

  
JOHN H. ROBERTUS  
Executive Officer

## PROOF OF SERVICE

LYNDA F. JOHNSTON declares:

I am over the age of eighteen years and not a party to this action. My business address is 559 Nathan Abbott Way, Stanford, California 94305-8610.

On May 8, 2008, I served the foregoing PETITION REQUESTING STATE WATER BOARD REVIEW OF REGIONAL WATER BOARD ORDER NO. R9-2008-0039

on all persons and entities identified below by placing true and correct copies thereof in a sealed envelope, with postage fully prepaid, in the United States Mail at Stanford, California, addressed as follows:

John H. Robertus  
Executive Officer  
California Regional Water Quality Control  
Board - San Diego Region  
9174 Sky Park Court, Suite 100  
San Diego, California 92123-4353

Douglas Eberhardt  
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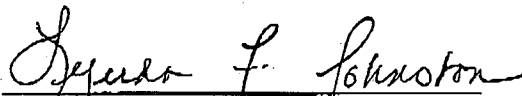
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I declare under penalty of perjury (under the laws of the State of California) that the foregoing is true and correct, and that this declaration was executed May 8, 2008 at Stanford, California.

  
LYNDA F. JOHNSTON